Ketua Pengarah Hasil Dalam Negeri (LHDN) v IBM Malaysia Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-294–04 OF 2018
VERNON ONG, YEW JEN KIE AND HAS ZANAH MEHAT JJCA
30 MAY 2019

Civil Procedure — Judicial review — Appeal against decision of High Court — High Court allowed respondent's application for judicial review of advance ruling issued by appellant — Whether advance ruling was amenable to judicial review — Whether respondent had choice whether or not to be bound by advance ruling — Whether there was domestic remedy available to respondent to appeal against advance ruling issued by appellant — Whether respondent should appeal on tax assessment to Special Commissioner of Income Tax

This was an appeal against the decision of the High Court, given on 27 March 2018, allowing the respondent's application for judicial review of an advance ruling issued by the appellant ('advance ruling'). The respondent was in the business of distributing software where, amongst others, the respondent purchases, distributes and markets various two computer software, and provides various IT services and hardware products manufactured by companies within the IBM Group. One of the companies within the IBM Group. IBM Ireland Product Distribution Ltd ('PDL'), maintained a significant software development capacity and engaged in substantial software development. It did not have any offices or establishment in Malaysia. The respondent and PDL intended to execute a software distribution agreement ('the agreement') which would grant the respondent the right to distribute the software programs developed and owned by PDL in Malaysia. It was a corporate decision that was made at the IBM Group level and many other companies in the IBM Group in other jurisdiction have executed the agreement. On 12 April 2016, the respondent made an application under s 138B of the Income Tax Act 1967 ('the Act') to the appellant, sought an advance ruling of whether the payment to be made by the respondent to a non-resident, PDL was royalty and was subject to withholding tax. On 7 June 2016, the appellant issued the advance ruling to the respondent, stating that the distribution fee payable by the respondent to PDL was a royalty and was therefore subjected to withholding tax under s 2 of the Act. On 23 August 2016, the respondent explained to the appellant that the distribution fee was not a royalty. On 1 September 2016, the respondent filed the application for judicial review seeking for the order of certiorari to quash the advance ruling issued by the appellant. The respondent and PDL executed the agreement. The High Court allowed the application for judicial review by

A the respondent and hence the appeal against the decision of the High Court.

Held, allowing the appeal and setting aside the High Court's decision with costs of RM10,000:

B (1) It was of the considered view that the learned judge had fallen into error in holding that the advance ruling was amenable to judicial review and that the application for judicial review was not premature because the advance ruling which was final and the binding nature had altered and deprived the respondent of its right, subjected the respondent to pay tax C on distribution fee and the respondent would suffer financial detriment and that the respondent did not have a right to appeal under s 99 of the Act as there was no notice of assessment issued by the appellant to the respondent (see para 40).

D (2) It was the considered view that although the advance ruling was disadvantageous to the respondent by treating the distribution fee payable by the respondent to non-resident, PDL, as royalty, it had not adversely affected the respondent until the respondent filed its tax return and tax was assessed. Until then the advance ruling remained at best the appellant's view on the tax treatment for the distribution fee payable E under the proposed transaction between the respondent and PDL with no tax liability. Advance ruling was a decision that did not have any tax implication as there was no assessment made by the appellant (see para 42).

F (3) The court was unable to agree with learned counsel for the respondent's submission that due to the finality and the binding of the advance ruling, it left the respondent with no choice whether or not to be bound by it and that there was no recourse of appeal under the Act or the Rules for the respondent who was adversely by it to challenge its illegality. The G respondent had no alternative but to come to court by way of judicial review. Although the advance ruling was final and binding, it did not leave the respondent without a choice whether or not to be bound by it as contended by the respondent (see paras 47–48).

H (4) The court was unable to agree with the respondent's contention that there was no domestic remedy available to them to appeal against the advance ruling which was illegal and adversely affecting them and had to resort to judicial review. There was an appeal remedy under s 99 of the Act but the respondent did not avail itself of the right by applying for judicial review instead. The respondent could have appealed to the I Special Commissioners against the notice of assessment under s 99 of the Act and ventilated the issues relating to the tax treatment stated in the advance ruling before the Special Commissioners. It expressly provided the right of appeal by filing a written notice of appeal within 30 days after service of the notice of assessment. It was established law that remedy by

way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases (see paras 54 & 56–58). A

(5) The proper forum to ventilate the issue was before the Special Commissioners by filing an appeal against the assessment or notice of assessment. It was as clear as daylight that by coming to the court as a forum to address its grievance in respect of the advance ruling, the respondent was using the backdoor to appeal against the advance ruling which was final and unappealable and it was circumventing the function of the Special Commissioners. It was an abuse of the court process and ought not to be allowed (see paras 61–62). B C

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi, yang diberikan pada 27 Mac 2018, yang membenarkan permohonan responden untuk semakan kehakiman atas ketetapan awal yang dikeluarkan oleh perayu ('ketetapan awal). Responden menjalankan perniagaan mengedar perisian di mana, antara lain, responden membeli, mengedar dan memasarkan pelbagai perisian komputer, dan menyediakan pelbagai perkhidmatan IT dan produk perkakasan yang dihasilkan oleh syarikat dalam Kumpulan IBM. Salah satu syarikat dalam kumpulan IBM, IBM Ireland Product Distribution Ltd ('PDL'), mengekalkan kapasiti perkembangan perisian yang penting dan terlibat dalam perkembangan perisian besar. Ianya tidak mempunyai pejabat atau perbadanan di Malaysia. Responden dan PDL berniat untuk memasuki perjanjian pengedaran perisian ('perjanjian tersebut') yang akan memberikan hak kepada responden untuk mengedarkan program perisian yang dihasilkan dan dimiliki oleh PDL di Malaysia. Ianya adalah keputusan korporat yang dibuat di peringkat kumpulan IBM dan pelbagai syarikat lain dalam kumpulan IBM di luar bidang kuasa telah memasukki perjanjian tersebut. Pada 12 April 2016, responden mengemukakan permohonan di bawah s 138B Akta Cukai Pendapatan 1967 ('Akta tersebut') kepada perayu, memohon ketetapan awal mengenai sama ada pembayaran yang akan dibuat oleh responden kepada bukan permastautin, PDL adalah royalti dan tertakluk kepada cukai pegangan. Pada 7 Jun 2016, perayu memberikan ketetapan awal kepada responden, dengan menyatakan bahawa *fee* pengedaran yang harus dibayar oleh responden kepada PDL adalah royalti dan oleh itu tertakluk kepada cukai pegangan di bawah s 2 Akta tersebut. Pada 23 Ogos 2016, responden menjelaskan kepada perayu bahawa fee pengedaran bukanlah royalti. Pada 1 September 2016, responden memfailkan permohonan semakan kehakiman yang memohon suatu perintah certiorari untuk membatalkan ketetapan awal yang diberikan oleh perayu. Responden dan PDL menandatangani perjanjian tersebut. Mahkamah Tinggi membenarkan permohonan semakan kehakiman oleh responden dan dengan itu rayuan terhadap keputusan Mahkamah Tinggi. D E F G H I

Diputuskan, membenarkan rayuan dan mengenepikan keputusan

Mahkamah Tinggi dengan kos RM10,000:

(1) Ianya adalah berpandukan pertimbangan bahawa hakim yang bijaksana telah terkhilaf dalam memutuskan bahawa ketetapan awal boleh dipinda berdasarkan semakan kehakiman dan bahawa permohonan semakan kehakiman tidak pra-matang kerana ketetapan awal adalah muktamad dan bersifat mengikat telah mengubah dan melucutkan responden terhadap haknya, memperuntukkan responden untuk membayar cukai bagi *fee* pengedaran dan responden akan mengalami kerugian kewangan dan bahawa responden tidak mempunyai hak untuk membuat rayuan di bawah s 99 Akta tersebut kerana tidak ada sebarang notis penilaian yang dikeluarkan oleh perayu kepada responden (lihat perenggan 40).

(2) Ianya adalah berpandungan pertimbangan bahawa walaupun ketetapan awal tersebut tidak menguntungkan responden dengan mengenakan *fee* pengedaran yang harus dibayar oleh responden kepada bukan permastautin, PDL, sebagai royalti, ia tidak memberi kesan buruk kepada responden sehinggalah responden memfailkan pulangan cukai dan cukai dinilai. Sehingga itu ketetapan awal kekal yang terbaik pada pandangan perayu terhadap perlakuan cukai untuk fee pengedaran yang perlu dibayar di bawah cadangan transaksi antara responden dan PDL tanpa sebarang tanggungan cukai. Ketetapan awal adalah keputusan yang tidak menyebabkan sebarang implikasi cukai kerana tidak ada penilaian yang dibuat oleh perayu (lihat perenggan 42).

(3) Mahkamah tidak dapat bersetuju dengan peguamcara yang bijaksana pada hujahan responden bahawa oleh kerana ketetapan awal adalah muktamad dan mengikat, ianya menyebabkan responden tanpa pilihan sama ada ianya akan terikat atau tidak dan tidak ada langkah bagi merayu di bawah Akta atau Kaedah bagi responden yang terkesan untuk mencabar kesahihannya. Responden tidak mempunyai sebarang alternatif selain ke mahkamah dengan cara semakan kehakiman. Walaupun ketetapan awal adalah muktamad dan mengikat, ia tidak membiarkan responden tanpa pilihan sama ada akan terikat atau tidak seperti yang didakwa oleh responden (lihat perenggan 47–48).

(4) Mahkamah tidak dapat setuju dengan pendapat responden bahwa tidak ada remedi domestik yang ada bagi mereka untuk merayu terhadap ketetapan awal yang tidak sah dan memberikan kesan buruk kepada mereka dan harus ke semakan kehakiman. Terdapat remedi rayuan di bawah s 99 Akta tersebut tetapi responden tidak memanfaatkan haknya dengan sebaliknya memohon semakan kehakiman. Responden seharusnya boleh merayu kepada pesuruhjaya khas terhadap notis taksiran di bawah s 99 Akta tersebut dan mengemukakan isu-isu yang berkaitan dengan perlakuan cukai yang dinyatakan dalam ketetapan awal di hadapan pesuruhjaya khas. Ia telah memperuntukkan hak merayu dengan memfailkan notis rayuan bertulis dalam masa 30 hari setelah

penyampaian notis taksiran. Iannya adalah undang-undang yang mantap bahawa remedi melalui semakan kehakiman tidak tersedia di mana terdapat remedi alternatif kecuali dalam kes-kes yang sangat luar biasa (lihat perenggan 54 & 56–58).

(5) Forum yang sesuai untuk mengemukakan isu tersebut adalah di hadapan pesuruhjaya khas dengan memfailkan rayuan terhadap penaksiran atau notis taksiran. Ianya adalah terang lagi bersuluh bahawa dengan hadir ke mahkamah sebagai forum untuk mengutarakan rungutannya berkenaan dengan ketetapan awal, responden menggunakan pintu belakang untuk merayu terhadap ketetapan awal yang muktamad dan tidak dapat dirayu dan ianya mendahului fungsi pesuruhjaya khas. Ia adalah penyalahgunaan proses mahkamah dan tidak seharusnya dibenarkan (lihat perenggan 61–62).]

Cases referred to

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197, CA (refd)

Mak Sik Kwong v Minister of Home Affairs, Malaysia [1975] 2 MLJ 168 (refd)

SKF Bearing Industries (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Case No NA-25–13–10 of 2017) (unreported), (refd)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 MLJ 53, HC (refd)

Zakaria bin Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors [2013] 5 MLJ 206, CA (refd)

Legislation referred to

Income Tax (Advance Ruling) Rules 2008 rr 2(1), (3), 3(2), 7(1), (2), 10(1), (2), 14, 14(1), 15, 16

Income Tax Act 1967 ss 2, 99, 103, 109H, 109H(1), 138B

Muhammad Farid bin Jaafar (Ridzuan bin Othman with him) (Lembaga Hasil Dalam Negeri (LHDN), Cyberjaya) for the appellants.

Datuk DP Naban (S Saravana with him) (Lee Hishammuddin Allen & Gledhill) for the respondents.

Yew Jen Kie JCA:

[1] This is an appeal by the appellant against the decision of the High Court, given on 27 March 2018, allowing the respondent's application for judicial review of an advance ruling issued by the appellant ('the advance ruling').

A BACKGROUND FACTS

[2] The respondent is in the business of distributing software where, amongst others, the respondent purchases, distributes and markets various computer software, and provides various IT services and hardware products manufactured by companies within the IBM Group.

[3] One of the companies within the IBM Group. IBM Ireland Product Distribution Ltd ('PDL'), maintains a significant software development capacity and has engaged in substantial software development. It does not have any offices or establishment in Malaysia.

[4] PDL presently holds the rights to distribute software programs which operate on various platforms throughout Europe, Canada, the Middle East and the Asia Pacific region.

[5] The respondent and PDL intended to execute a software distribution agreement ('the agreement') which will grant the respondent the right to distribute the software programs developed and owned by PDL in Malaysia. This is a corporate decision that was made at the IBM Group level and many other companies in the IBM Group in other jurisdiction have executed this agreement.

[6] On 12 April 2016, the respondent made an application under s 138B of the Income Tax Act 1967 ('the ITA') to the appellant, seeking an advance ruling of whether the payment to be made by the respondent to a non-resident, PDL is royalty and is subject to withholding tax. The application was accompanied by, amongst others, a draft copy of the agreement and a description of the arrangement and subsequently, upon request by the appellant, a diagram summarising the arrangement under the draft agreement.

[7] On 7 June 2016, the appellant issued the advance ruling to the respondent, stating that the distribution fee payable by the respondent to PDL is a royalty and is therefore subject to withholding tax under s 2 of the ITA.

[8] On 23 August 2016, the respondent explained to the appellant that the distribution fee is not a royalty.

[9] On 1 September 2016, the respondent filed the application for judicial review seeking for the order of certiorari to quash the advance ruling issued by the appellant.

[10] On 31 December 2016, the respondent and PDL executed the agreement.

[11] On 27 March 2018, the High Court allowed the application for judicial review by the respondent.

[12] Hence the appeal against the decision of the High Court.

ADVANCE RULING

[13] Advance ruling was introduced by the Inland Revenue Board of Malaysia ('IRBM') in 2007 in the wake of the announcement by the Prime Minister in the budget 2007 speech.

[14] The whole intention of advance ruling is stated in the guidelines on advance rulings ('the guidelines') issued by the IRBM provides. Paragraphs 1 and 2 thereof state:

1. INTRODUCTION

> With effect from 1 January 2007, the Inland Revenue Board of Malaysia (IRBM) may issue advance rulings on the interpretation and application of the Income tax provisions under the Income Tax Act 1967 (ITA) upon request by any person. The new service by IRBM was announced by the Honourable Prime Minister in the Budget 2007 speech.
>
> The issuance of an advance ruling aims to ensure clarity and certainty of tax treatment and consistency in the application of the Income tax law. This in turn will help to promote compliance and minimize disputes between the IRBM and taxpayers.

2. MEANING OF AN ADVANCE RULING

> An advance ruling is a written statement by the DGIR to a person giving an interpretation on how any provision of the ITA applies to a proposed arrangement described in an application.

THE LAW

[15] The specific provisions which introduced the service of advance ruling by the appellant is found in s 138B of the Income Tax Act 1967 ('the ITA'), which stipulates:

> 138B Advance ruling
>
> (1) Subject to this section or any rules prescribed under this act, on the application made by any person, the Director General shall make an advance ruling on the application of any provision of this act to the person and to the arrangement for which the ruling is sought.

(2) An application under subsection (1) shall be made in the prescribed form and shall contain particulars as may be required by the Director General.

[16] Paragraph 2(1) of the Income Tax (Advance Ruling) Rules 2008 PU(A) 41/2008 ('the Rules') stipulates the scope of the advance ruling, it states:

2 Scope of advance ruling

(1) The Director General shall, on the application made by any person, make an advance ruling on how any provision of the act applies or would apply to the person and to the arrangement for which the advance ruling is sought.

[17] Paragraph 2(3) of the Rules provides that advance ruling will be issued by the appellant for the arrangements that are seriously contemplated by the applicant for the ruling. It states:

(3) And advance ruling under subrule (1) and (2) shall be issued for arrangements that are seriously contemplated by the person applying for a ruling under subrule (1).

[18] Paragraphs 7(1) and 7(2) of the Rules which provide for the application for advance ruling, state:

7 Application for an advance ruling

(1) An application for an advance ruling shall be made in the form as determined by the Director General.

(2) For the purpose of subrule (1), the Director General may require the person who applies for an advance ruling to submit, among others, the following particulars:

(a) the identity of the person applying for the advance ruling;

(b) a complete description of all relevant facts and documents relating to the arrangement in respect of which the advance ruling is sought;

(c) a statement identifying the relevant provisions of the Act in respect of which the advance ruling is sought;

(d) the proposition of law, if any, which is relevant to the issues raised in the application;

(e) a statement whether a previous application has been made on the same or any similar arrangement by the person applying for the advance ruling and the result of any such application; and

(f) any other particulars as may be required by the Director General.

[19] Paragraphs 10(1) and (2) of the Rules govern the form and nature of an advance ruling, which state:

10 Form and nature of the advance ruling

(1) An advance ruling made by the Director General shall state the following:

(a) that it is and advance ruling made under section 138 of the Act;

(b) the identity of the person, the provision of the Act and the arrangement as specified in the application to which the advance ruling applies;

(c) how the provision of the Act applies to the arrangement and to the person to which the advance ruling applies;

(d) the period or year of assessment from which the advance ruling applies;

(e) the material assumptions about future events or other matters made by the Director General;

(f) the conditions, if any, stipulated by the Director General to which the advance ruling is subject.

[20] Paragraph 14 of the Rules states:

14 Application not to affect objection or powers

(1) Any person making an application under subrule 2(1) shall not be absolved from complying with any obligation or requirement under the Act.

(2) The power of the Director General make or amend any assessment under the provisions of the Act shall not be affected notwithstanding any advance ruling issued by the Director General.

[21] Paragraph 15 of the Rules requires the person to whom an advance ruling has been issued to disclose in its tax return the issuance of the advance ruling and whether or not it is relying on its and any material changes. It states:

15 Disclosure of an advance ruling in the return

(1) Where an advance ruling has been issued to any person and the person is required to furnish a return under the Act for any year of assessment that relates to the period applicable under the advance ruling, that person shall, in preparing the return, take into account the manner in which a provision of the Act is applied to an arrangement pursuant to such advance ruling.

(2) For the purpose of subrule (1), the person to whom the advance ruling applies shall disclose in the return:

(a) the issuance of the advance ruling;

(b) whether or not he has relied on the advance ruling in preparing and providing the return; and

(c) any material change to the arrangement to which in the advance ruling applies.

[22] Paragraph 16 of the Rules states:

16 Finality of an advance ruling

(1) An advance ruling issued to any person for the purpose of any arrangement shall be final.

(2) No appeal shall be lodged by any person against any advance ruling.

ISSUES

[23] The four issues before the High Court were:

(a) whether the advance ruling is a decision which is binding upon the respondent;

(b) whether the application for judicial review is pre-mature;

(c) whether the domestic appeal remedies under the ITA are available to the respondent; and

(d) whether the distribution fee payable under the agreement is a royalty.

HIGH COURT'S DECISION

[24] The learned judge allowed the application for judicial review of the advance ruling on the following grounds:

(a) the explanatory note to cl 26 of the Finance Bill 2006 and para 16 of the Rules explicitly stated that the advance ruling is final and binding on both parties, and it is therefore a decision (see: paras 44–45 of the grounds);

(b) the advance ruling is a decision which has 'altered and deprived the respondent of its right by subjecting the distribution fee to withholding tax as the respondent will suffer financial detriment and will have to pay tax'. Accordingly, the judicial review application is not premature (see: para 40 of the grounds);

(c) there is no alternative remedy under s 99 of the ITA available to the respondent. The right of appeal under s 99 does not arise since no amount was due from the respondent as there is no assessment made, nor is there any service of the notice of assessment (see: para 61 of the grounds);

(d) the right of appeal under s 109H(1) of the ITA does not arise as no amount was due from the respondent to the appellant (see: para 64 of the grounds);

(e) the Rules do not accord the respondent any recourse or alternative remedy either under the Act or otherwise with regards to the appellant's failure to appreciate and give effect to the settled case law and legislation in coming to the decision, and the only remedy available is by way of judicial review (see: para 67 of the grounds);

(f) as for royalty, the definition under the Double Taxation Agreement applies and not the definition under the ITA (see: para 81 of the grounds); and

(g) the distribution fee payable to PDL under the agreement for the purchase, distribution and sale of PDL's products (ie software programs) is not a royalty (see: para 82 of the grounds).

THE APPEAL

The appellants' contention

[25] The appellant complained that the learned judge had fallen into error in holding that judicial review of the advance ruling is not premature. It was submitted that the purpose of advance ruling is to provide clarity and certainty in tax treatment. An advance ruling merely represents the view of the appellant on certain tax treatment based on the future transaction. It is a decision which does not impose any tax liability. The respondent is under no obligation to pay tax as assessment has yet to be made. No tax is payable until an assessment is made under s 103 of the ITA.

[26] It was further submitted that whether the advance ruling is favourable or otherwise to the respondent as a taxpayer, the respondent had the choice whether or not to be bound by it. The learned judge erred in failing to give effect to para 15 of the Rules which renders it mandatory on the respondent to whom an advance ruling has been issued to disclose in the tax return whether or not it is relying on the advance ruling issued by the appellant. Given that the respondent has not provided any evidence that it has disclosed in the tax return its compliance with para 15 of the Rules, the advance ruling issued by the appellant is inapplicable to the respondent. Under the circumstance, the advance ruling did not adversely affect the respondent as ruled by the learned judge, citing *SKF Bearing Industries (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Case No NA-25–13–10 of 2017) (unreported).

[27] It was further submitted that the learned judge in holding that the alternative remedy or domestic remedy is not available to the respondent under the ITA to appeal against the advance ruling, had failed to appreciate that an advance ruling is final and not appealable, it being a representation of the view of the appellant cannot be enforced under the ITA, citing *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563 and *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197.

[28] It was also submitted that pursuant to s 99 and 109H of the ITA, a party who is aggrieved by the assessment made in respect of him may appeal to the

Special Commissioners of Income Tax. As there are appeal remedy available to the respondent, the respondent must show there exist special circumstances for application for judicial review, citing *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 (FC) and *Zakaria bin Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors* [2013] 5 MLJ 206 (CA).

[29] It was submitted that the basis of the respondent's application for judicial review is the interpretation of law on whether payment by the respondent to a non-resident, IPD, is royalty. The adoption of a different interpretation of law does not amount to an error of law on the face of the record and is therefore not the basis for judicial review, citing *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 MLJ 53.

The respondent's contention

[30] Learned counsel for the respondent submitted that the condition precedent to the application for advance ruling under para 3(2) of the Rules is 'seriously contemplated arrangement' and this condition has been met as the draft agreement between the respondent and PDL is a seriously contemplated arrangement. This is acknowledged by the appellant by its issuance of the advance ruling. It was submitted that the phrase 'seriously contemplated arrangements' under para 2(3) of the Rules does not confer any additional rights on the respondent, that is, the right to choose whether or not to be bound by the advance ruling.

[31] It was further submitted that nowhere in the Rules or the ITA has provided that the respondent is at liberty to choose whether or not to be bound by the advance ruling.

[32] It was submitted that the learned judge had, after taking into consideration s 138B of the ITA, the Rules, the Finance Bill and the facts of the present case, arrived at the decision that the advance ruling being conclusive and binding in nature is a decision. Given that the advance ruling is a decision which is binding upon the respondent, the learned judge is correct in holding that the application for judicial review is not premature.

[33] It was submitted that there is nothing in the ITA, the Rules or any written law that makes compliance with para 15 of the Rules a prerequisite to filing of judicial review.

[34] It was submitted that para 15 of the Rules comes into play only when the respondent submits its tax return. The respondent had yet to file and submit the return for year of assessment ('YA') 2016 as it had taken steps to seek the court's intervention to quash the advance ruling before submitting the tax

return. Given that the judicial review application was made prior to the filing of the return, the issue of non-compliance with para 15 of the Rules is a non-starter.

[35] It was submitted that the learned judge is correct in holding that the Rules do not accord the respondent any recourse or alternative remedy to challenge the appellant's decision in the advance ruling which is ultra vires, illegal and unlawful, the only remedy available to the respondent is by way of judicial review.

[36] It was submitted that the learned judge by adopting the principle as laid down by Abdoolcader J (as he then as) in *Mak Sik Kwong v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 had found that the advance ruling had adversely affected the respondent by subjecting the distribution fees to withholding tax. The advance ruling has jeopardised, deprived and altered the respondent's right and it will suffer financial detriment and will have to pay tax.

[37] Learned counsel for the respondent submitted that the learned judge is correct in holding that the domestic appeal remedies under ss 99 and 109H of the ITA were not available to the respondent and therefore the only remedy available is judicial review.

[38] It was submitted that under s 99 of the ITA, a right to appeal only arises for an assessment made by filing a written notice of appeal within 30 days after service of the notice of assessment. Thus, to invoke s 99 of the ITA, the appellant must have issued an assessment to the respondent. And, the appellant will issue assessment only after the respondent had filed and submitted its tax return. It is a fact that the respondent has yet to submit the tax return for year of assessment 2016.

[39] In absence of an assessment issued by the appellant and service of the notice of assessment, the learned judge held that the right of appeal under s 99 of the ITA is not available to the respondent.

OUR DECISION

[40] It is our considered view that the learned judge had fallen into error in holding that the advance ruling is amenable to judicial review and that the application for judicial review is not premature because the advance ruling which is final and the binding nature has 'altered and deprived the respondent of its right', 'subjected the respondent to pay tax on distribution fee and the respondent will suffer financial detriment' and that the respondent does not have a right to appeal under s 99 of the ITA as there was no notice of assessment issued by the appellant to the respondent. Our reasons are as follows.

[41] It is unarguable that the respondent was contemplating a serious business arrangement with PDL which prompted the respondent to apply for an advance ruling on the treatment of the distribution fee payable by the respondent to non-resident, PDL. In response to this application, the appellant issued the advance ruling stating that the royalty fee payable by the respondent to PDL will be treated as royalty.

[42] It is our considered view that although the advance ruling is disadvantageous to the respondent by treating the distribution fee payable by the respondent to non-resident, PDL, as royalty, it has not adversely affected the respondent until the respondent has filed its tax return and tax was assessed. Until then the Advance Ruling remains at best the appellant's view on the tax treatment for the distribution fee payable under the proposed transaction between the respondent and PDL with no tax liability. As rightly submitted by learned senior revenue counsel, advance ruling is a decision that does not have any tax implication as there is no assessment made by the appellant.

[43] We agree with the learned judge that the advance ruling issued by the appellant is a decision that is final and binding in nature. Its binding nature is clearly reflected in the explanatory notes to cl 26 of the Finance Bill 2006, which reads:

> Clause 26 also seeks to introduce a new section 138B into Act 53. With this proposed amendment, a person may request for a ruling from the Director General of Inland Revenue on the application of any provision of Act 53 to a particular type of arrangement. *Subject to certain qualifications, the ruling issued under this section is binding on the person and the Director General.* (Emphasis added.)

[44] The binding nature of an advance ruling is further reiterated in paras 4.1 and 4.2 of the Guidelines, which state:

> 4.1 an advance ruling is binding upon a person in relation to an arrangement and only for the period of YA specified in the advance ruling; and
>
> 4.2 an advance ruling is binding upon the DGIR, subject to any qualification stated in the advance ruling ...

[45] Paragraph 16 of the Rules expressly states that an advance ruling issued to any person for the purpose of any arrangement shall be final.

[46] The reading of the above provisions amply shows that the view or the decision stated in the advance ruling is final and unappealable.

[47] We are unable to agree with learned counsel for the respondent's submission that due to the finality and the binding of the advance ruling, it

leaves the respondent with no choice whether or not to be bound by it, and that there is no recourse of appeal under the ITA or the Rules for the respondent who is adversely by it to challenge its illegality. Hence, the respondent has no alternative but to come to court by way of judicial review.

[48] Although the advance ruling is final and binding, it does not in our view leave the respondent without a choice whether or not to be bound by it as contended by the respondent. We fortify our view with the Guidelines issued by the appellant.

[49] Paragraph 12 of the Guidelines under 'FINALITY AND DISCLOSURE OF AN ADVANCE RULING' reads as follows:

> 12.1 Once an advance ruling is issued, it is considered final irrespective of whether it is advantageous to the person or not. No further correspondence or enquiry will be entertained and no appeal can be made against the advance ruling. In the case of a disadvantageous advance ruling, the person has the choice of not carrying out the proposed arrangement. On the other hand, if the proposed arrangement is effected, then the advance ruling has to be complied with. The applicant can make an appeal objecting to the tax treatment stated in the advance ruling under the normal provision for appeal stated in section 99 of the ITA. That means the objection is against the notice of assessment made.

[50] From the reading of para 12 of the Guidelines, it is our understanding that:

(a) an advance ruling is final and unappealable regardless of its advantage or lack of advantage to the applicant. This resonates with para 16 of the Rules which provides that an advance ruling issued for any person for the purpose of any arrangement shall be final and that no appeal shall be lodged by any person against any advance ruling;

(b) where advance ruling is disadvantageous to the applicant, he has a choice to not proceed with the proposed arrangement;

(c) if the applicant chose to effect the proposed arrangement, then he has to comply with the advance ruling; and

(d) any objection to the tax treatment stated in an advance ruling may be taken up in an appeal to the Special Commissioners under s 99 of the ITA.

[51] Paragraph 12 of the Guidelines above amply shows that the respondent has a choice whether or not to be bound by the advance ruling. If the respondent finds the advance ruling is disadvantageous to the proposed business transaction with PDL, it could have chosen not to proceed with the proposed business transaction.

[52] It is undisputed fact that the respondent had on 31 December 2016 executed the agreement with PDL. In effecting the proposed business transaction simply means that the respondent had chosen to be bound by the advance ruling. As such, the respondent has to comply with the advance ruling. There is no two way about it as this is clearly stated in the guidelines mentioned above and para 14(1) of the Rules.

[53] However, the respondent feeling aggrieved by the disadvantageous advance ruling applied to the court for judicial review of the advance ruling — a move which in our view is premature.

[54] We are unable to agree with the respondent's contention that there is no domestic remedy available to them to appeal against the advance ruling which is illegal and adversely affecting them. Hence it had to resort to judicial review. We say so because there is an appeal remedy under s 99 of the ITA but the respondent did not avail itself of this right by applying for judicial review instead.

[55] It is clearly provided in para 14(1) of the Rules that applicant for advance ruling shall not be absolved from complying with any obligation or requirement under the ITA. Thus, notwithstanding that the respondent is unhappy with the unfavourable advance ruling, it is still required under the ITA to file the tax return for years of assessment ('YA') 2016.

[56] If the respondent had complied with the requirement under the ITA to file the tax return for YA 2016 and, pursuant para 15 of the Rules, disclosed in the return: (a) the issuance of the advance ruling; (b) whether it is relying on the advance ruling in preparing and providing the return; and (c) any material change to the arrangement to which the advance ruling applies, the aggrieved respondent could have appealed to the Special Commissioners against the notice of assessment under s 99 of the ITA and ventilate the issues relating to the tax treatment stated in the advance ruling before the Special Commissioners.

[57] Section 99 of the ITA expressly provides the right of appeal by filing a written notice of appeal within 30 days after service of the notice of assessment.

[58] It is established law that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases. In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110, the Federal Court held:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review.

> Judicial review is always at the discretion of the court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances. In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that *remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases*.

[59] In *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197 (CA), it was held:

> (3) The respondent failed to show any special or exceptional circumstances for judicial review. It was not justified in choosing the court as a forum to ventilate its grievance when there was in existence the specific remedy of appeal before the Special Commissioners of Income Tax ('SCIT') under s 109H (1) of the ITA.

[60] The main grievance of the respondent against the advance ruling is the treatment of distribution fee payable by the respondent to a non-resident as royalty. It is a matter of interpretation of law, which is not a special circumstance to allow a judicial review application.

[61] We have noted that both parties submitted extensively on the issue whether the distribution fee payable by the respondent to PDL is a royalty. Suffice it to say that in our view, the proper forum to ventilate this issue is before the Special Commissioners by filing an appeal against the assessment or notice of assessment.

[62] It is as clear as daylight that by coming to the court as a forum to address its grievance in respect of the advance ruling, the respondent was using the backdoor to appeal against the advance ruling which is final and unappealable and it is also circumventing the function of the Special Commissioners. This is an abuse of the court process and ought not be allowed.

CONCLUSION

[63] For all the reasons aforesaid, we allowed the appeal with costs of RM10,000 for here and below, subject to the payment of allocator. The order of the High Court dated 27 March 2018 is set aside. We allowed the interim stay of the advance ruling until the disposal of leave application at the Federal Court.

A *Appeal allowed with costs of RM10,000 subject to allocator and High Court decision set aside.*

Reported by Mohd Kamarul Anwar

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